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No. 10-315

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In The
Supreme Court of the United States

SONIC AUTOMOTIVE, 2752 LAURENS RD., GREENVILLE, INC., D/B/A CENTURY BMW,
Petitioner,

v.

CHRISTINE WATTS, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of South Carolina

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 3

REASONS WHY THE PETITION SHOULD NOT BE GRANTED 10

A. No justiciable case or controversy exists in this matter because Petitioner remains in default. 10

B. The South Carolina Supreme Court never addressed the issue of federal preemption nor did the Petitioner properly present it. . 11

C. It is the longstanding policy of the United States Supreme Court and Congress to allow courts to void arbitration contracts based on state law defenses, which includes agreements in violation of public policy. . . 14

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Adams v. Robertson,
520 U.S. 83 (1977) 11, 13

Andrew v. Louisville & N. R. Co.,
406 U.S. 320 (1972) 14

AT&T Mobility, LLC v. Concepcion,
No. 09893 (*cert. granted* May 24, 2010) 16

Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.,
606 S.E.2d 752 (S.C. 2004) 7

Dill v. Sovereign Camp,
25 S.E.2d 285 (S.C. 1943) 15

Doctor's Assocs. Inc. v. Casarotto,
517 U.S. 681 (1996) 15

Izumi Seimitzu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.,
510 U.S. 27 (1993) 14

Kennedy v. South Carolina Ret. Sys.,
564 S.E.2d 322 (S.C. 2001) 12

Roche v. Young Bros., Inc., of Florence,
504 S.E.2d 311 (S.C. 1998) 10

Robert E. Lee & Co. v. Comm'n of Pub. Works of City of Greenville,
158 S.E.2d 185 (S.C. 1967) 17

Simpson v. MSA of Myrtle Beach, Inc.,
644 S.E.2d 663 (S.C. 2007) 4

Southland Corp. v. Keating,
465 U.S. 1 (1984) 1

Stark Trust Co., Inc. v. Superior Constr. Corp.,
602 S.E.2d 99 (S.C. App. 2004) 10

Stolt-Nielson, S.A. v. Animalfeeds Int'l Corp.,
130 S.Ct. 1758 (2010) 8, 12

Ulner v. Ulner,
369 S.C. 486, 632 S.E.2d 858 (2006) 17

Webb v. Webb,
451 U.S. 493 (1981) 13

White v. J.M. Brown Amusement Co.,
601 S.E.2d 342 (S.C. 2004) 15

Wilder Corp. v. Wilke,
497 S.E.2d 731 (S.C. 1998) 12

Statutes

9 U.S.C. § 2 . . . . . *passim*

28 U.S.C. § 1257(a) 1

S.C. Code Ann. § 37-2-307 3

South Carolina Dealer's Act . . . . . *passim*
S.C. Code Ann. § 56-15-10 . . . . . 3, 4
S.C. Code Ann. § 56-15-40 1
S.C. Code Ann. § 56-15-110 . . . . . 2, 6

S.C. Code Ann. § 56-15-110(2) 7
S.C. Code Ann. § 56-15-130 . . . . . 3, 7

Rules

S.C. App. Ct. R. 221 8

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent respectfully submits that the Petition for a Writ of Certiorari to review the judgment of the Supreme Court of South Carolina in this case should be denied.

OPINIONS BELOW

The opinions below are as set forth by Petitioner.

JURISDICTION

This Court does not have jurisdiction pursuant to 28 U.S.C. § 1257(a) and *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984) as contended by Petitioner, because:

1. Petitioner is in default in the court below; and

2. the South Carolina Supreme Court did not decide and was not asked to decide the issue of federal preemption; and

3. the issue of preemption, even if preserved, is inapplicable.

STATUTORY PROVISIONS INVOLVED

In addition to 9 U.S.C. § 2 cited by Petitioner, also involved are the following:

S.C. Code Ann. § 56-15-40. Specific acts deemed unfair methods of competition and unfair or deceptive

acts or practices; Office of Administrator; appointment of personnel; enforcement.

(1) It shall be deemed a violation of paragraph (a) of § 56-15-30 for any manufacturer, factory branch, factory representative, distributor, or wholesaler, distributor branch, distributor representative or motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public.

S.C. Code Ann. § 56-15-110. Suits for damages.

(1) In addition to temporary or permanent injunctive relief as provided in § 56-15-40(3)(c), any person who shall be injured in his business or property by reason of anything forbidden in this chapter may sue therefor in the court of common please and shall recover double the actual damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

(2) When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.

(3) In an action for money damages, if the jury finds that the defendant acted maliciously, the jury may award punitive damaged not to exceed three times the actual damages.

(4) A final judgment, order or decree rendered against a person in any civil, criminal or administrative proceeding under the United States

antitrust laws, under the Federal Trade Commission Act, or under this chapter shall constitute prima facie evidence against such person subject to the conditions of the United States Antitrust Law (15 U.S.C. § 16).

S.C. Code Ann. § 56-15-130. Contracts in violation of chapter shall be void.

Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable.

S.C. Code Ann. § 37-2-307. Notice of closing fees on motor vehicle sales contract; registration fees.

Every motor vehicle dealer charging closing fees on a motor vehicle sales contract shall pay a one-time registration fee of ten dollars during each state fiscal year to the Department of Consumer Affairs. The closing fee must be included in the advertised price of the motor vehicle, disclosed on the sales contract, and displayed in a conspicuous location in the motor vehicle dealership.

STATEMENT

This action was initiated on August 29, 2006. Respondent alleges that Petitioner was charging illegal closing fees in violation of S.C. Code Ann. § 37-2-307 and § 56-15-10, *et. seq.* and did engage in one or more of the following illegal acts:

a. failed to register with the Department of Consumer Affairs;

b. failed to individually register annually with the Department of Consumer Affairs;

c. charged illegal "administrative fees" in excess of the amount for which it registered;

d. failed to disclose the illegal "administrative fees" on sales contracts;

e. charged illegal "administrative fees" in excess of their costs;

f. failed to display the charging of illegal "administrative fees" in a conspicuous location in the dealership;

g. advertised deceptively and illegally by failing to include the "administrative fees" in the advertised price; and

h. created a closing procedure to illegally add "administrative fees."

Respondent contends that the conduct of the Petitioner violates the South Carolina Dealer's Act. (S.C. Code Ann. § 56-15-10).

Petitioner filed a motion to compel arbitration, claiming arbitration was required by an agreement under which the Respondent waived the right to bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration. This motion was denied by the trial court in an order dated March 10, 2008. (Pet 16a). The order properly concluded that *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663 (S.C. 2007) was "the controlling

authority" for the motion. (Pet 18a). Further, as reflected in the order, the motion was decided wholly on state law grounds.

On March 12, 2008, the Petitioner filed a notice of appeal to the South Carolina Court of Appeals. Once again, the issues presented were primarily state issues. As set forth by appellant/petitioner, the statement of issues on appeal to the South Carolina Supreme Court was as follows:

I. Did the trial court err in denying the Appellant's motion to compel arbitration when the court violated the federal and South Carolina policies favoring arbitration?

II. Did the trial court err in denying the Appellant's motion to compel arbitration when the court found the arbitration agreement unenforceable despite the Wattses' undisputed opportunity to read the agreement?

III. Did the trial court err in denying the Appellant's motion to compel arbitration when the court found the underlying arbitration agreement unconscionable?

IV. Did the trial court err in denying the Appellant's motion to compel arbitration when it found Ms. Watts lacked meaningful choice in agreeing to arbitrate?

V. Did the trial court err in denying the Appellant's motion to compel arbitration when the court found the underlying arbitration agreement was a contract of adhesion?

VI. Did the trial court err in denying the Appellant's motion to compel arbitration when the court found the underlying arbitration agreement contained oppressive, one-sided terms that no reasonable person would make or accept?

Petitioner's only possible mention of the Federal Arbitration Act was in passing when Petitioner asserted that the trial court violated federal policy favoring arbitration by resolving doubt against arbitration, Pet. S.C. C.A. Brief. 11. On July 6, 2009, before the South Carolina Court of Appeals ruled, the South Carolina Supreme Court took the appeal. On April 19, 2010, the South Carolina Supreme Court issued its decision wherein it specifically recognized the federal policy in favor of arbitration (Pet 4a). Of significance, the issue of federal preemption of South Carolina law was never raised by the Petitioner. The South Carolina Supreme Court held, wholly on state law grounds,[1] that the provision of the arbitration agreement relied upon by Petitioner was invalid, unenforceable, and in violation of the public policy of South Carolina, specifically South Carolina Code § 56-15-110. The decision in pertinent part is as follows:

> The purpose of the Dealers Act is consumer protection. Damages are typically small in individual consumer cases, thereby discouraging plaintiffs from bringing individual actions. Our Legislature recognized this and

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[1] The order denying the Petition for Rehearing confirms that the South Carolina Supreme Court opinion was "wholly based on state law grounds." (Pet 15a).

expressly provided plaintiffs with the right to bring class action lawsuits for violations of the Dealers Act:

> When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.

Section 56-15-110(2). The Dealers Act further provides: "Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable." Section 56-15-130.

Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit, violates our State's public policy and is void and unenforceable... We are guided by our state law, and the unmistakable statutory language contained in the Dealers Act indicating our Legislature intended for this to be a non-waivable right. We therefore hold this provision is unenforceable on public policy grounds. *See Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 606 S.E.2d 752, 758 (S.C. 2004) (holding the general rule is that courts will not enforce a contract which is

violative of public policy, statutory law, or provisions of the Constitution).

Following the South Carolina Supreme Court's refusal to enforce the arbitration agreement at issue, Petitioner filed a Petition for Rehearing pursuant to South Carolina Appellate Court Rule 221. Specifically, a petition for rehearing must "state with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221, SCACR. The Petition for Rehearing did not contend that the South Carolina Supreme Court overlooked the preemption argument now raised by Petitioner.[2] Rather, the points raised by Petitioner related to 1) the supposed inconsistency between the opinion and the case of *Stolt-Nielson S.A. v. Animalfeed International Corp.*; 2) whether the South Carolina Legislature intended to created a non-waivable right to bring a class action under the Dealers Act and 3) whether arbitration

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[2] The Petitioner argues that *Stolt-Nielson, S.A. v. Animalfeeds International Corp.*, 130 S.Ct. 1758 (2010) is inconsistent with the South Carolina Supreme Court opinion. Petitioner now argues that the FAA preempts South Carolina law. Petitioner cited three South Carolina cases addressing this proposition. These cases held that the FAA did not preempt South Carolina's procedural rule on appealability of arbitration, that the FAA did preempt a notice provision of the South Carolina Arbitration Act and did preempt a state statute precluding arbitration held outside of South Carolina "under the circumstances presented." None of these cases address whether South Carolina public policy involved in the present case is preempted by the FAA. There is not any argument advanced by Petitioner below that the public policy defense does not qualify as a valid ground for revocation of contracts under the exception to 9 U.S.C. § 2, allowing courts to invalidate arbitration provisions "upon such grounds as exist at law or in equity for the revocation of any contract."

should be required for causes of action for civil conspiracy and declaratory judgment. At no time did the Petitioner raise the very applicable 9 U.S.C. § 2. By order dated June 9, 2010, the South Carolina Supreme Court denied the petition for rehearing stating:

> We deny Century's petition for rehearing. Our opinion affirming the trial court's denial of the motion to compel arbitration is wholly based on state law grounds, namely a provision in a contract banning class action suits is invalid pursuant to the Dealer's Act and the public policy of this State.

On June 9, 2010 the South Carolina Supreme Court issued a remittitur to the trial court which became effective on June 24, 2010. Under South Carolina Rules of Civil Procedure, 12(a), Petitioner's answer was required fifteen days after notice of the South Carolina Supreme Court's action denying rehearing and remitting the case. Petitioner did not answer the complaint by July 9, 2010, Respondents filed an affidavit of default, and the Clerk of Court entered default on August 10, 2010. On September 1, 2010, Petitioner filed a Petition for a Writ of Certiorari to this Court and on September 3, 2010 Petitioner filed in the trial court a motion to set aside the entry of default below. As of the present date Petitioner is still in default.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

Petitioner Century BMW's Petition for Writ of Certiorari to this Court should be denied for three reasons: 1) No justiciable case or controversy exists in this matter as a result of Petitioner being in default; 2) Petitioner has clearly failed to preserve and the South Carolina Supreme Court did not address the federal preemption issue for an appeal to this Court; and, 3) it is the longstanding policy of the United States Supreme Court and Congress to permit courts to void arbitration contracts based on state law.

A. No justiciable case or controversy exists in this matter because Petitioner remains in default.

The Petitioner is in full default in the case below. As set forth above, Petitioner's response to the complaint was due fifteen days after notice of the South Carolina Supreme Court's Opinion affirming the denial of the motion to arbitrate, but petitioner defaulted. This fact was made to appear by affidavit and the Clerk of Court entered default. This is a ministerial act which a clerk of court is required to perform, and the court's entry of default is thus proper. *Stark Trust Co., Inc. v. Superior Constr. Corp.*, 602 S.E.2d 99 (S.C. App. 2004). The Petitioner has now moved to set aside the entry of default but no relief has been granted. Accordingly, at the present time Petitioner is in default and under South Carolina law a defaulting party is deemed to have admitted the truth of plaintiff's allegations and to have conceded liability. Moreover, after default, the trial court may proceed as appropriate to enter judgment. *Roche v.*

Young Bros., Inc., of Florence, 504 S.E.2d 311 (S.C. 1998).

Since Petitioner is in default in this case, no justiciable case or controversy exists which would allow Petitioner the requisite standing to petition this Court for A Writ of Certiorari. For this reason Respondents respectfully submit that the Petition herein should be denied.

B. The South Carolina Supreme Court never addressed the issue of federal preemption nor did the Petitioner properly present it.

The issue upon which Petitioner seeks review here was clearly not addressed by the South Carolina Supreme Court, nor was it raised. Petitioner has not met the burden of showing the preemption issue was properly presented below.[3]

In the petition herein Petitioner does not, as required by Rule 14(g)(i), specify the stage in the proceeding the issue was raised in the court of first instance. This being so, the issue is not appropriate for appellate review under South Carolina law which provides that:

> an issue cannot be raised for the first time on appeal, but must have been raised and ruled upon by the trial judge to be preserved for appellate review... Moreover, an objection must

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[3] When the highest state court is silent on a federal question it is presumed that the issue was not properly presented. *Adams v. Robertson*, 520 U.S. 83, 86 (1977).

be sufficiently specific to inform the trial court of the point being urged by the objector. *Wilder Corp. v. Wilke*, 497 S.E.2d 731 (S.C. 1998).

The Petitioner apparently contends that the preemption issue upon which it now seeks review was raised in its brief to the South Carolina Supreme Court by arguing that the trial court order "violated the federal policy favoring arbitration," (Pet 4) and on petition for rehearing by contending that "*Stolt Nielson* supported the proposition that the FAA preempted any state law that invalidates a provision of an arbitration agreement precluding the availability of class arbitration." (Pet 5).

Petitioners incorrectly argue that they properly raised the pre-emption issue by their contention that the Order on appeal violated federal policy favoring arbitration. This contention, however, in no way raised the issue presented herein. Moreover, the fact that no citation to 9 U.S.C. § 2 and no specific arguments as to the preemption law were made below, as are made in the petition herein, undermines the present assertion that Petitioners presented the issue. The argument, actually made for the first time on petition for rehearing was that, the South Carolina Supreme Court opinion was "inconsistent with" *Stolt-Nielson*. That does not clearly present the preemption argument.

Even so, raising the issue for the first time on Petition for Rehearing renders the issue inappropriate for review under South Carolina law. *Kennedy v. South Carolina Retirement System*, 564 S.E.2d 322 (S.C. 2001) makes clear that an argument not presented on the appeal and therefore not considered

by the court is not proper for consideration when deciding whether to grant a petition for rehearing.

As shown above, Petitioner never presented any preemption issue in the trial court, although the main principles raised by preemption law clearly existed at the time the case was brought. Neither did Petitioner properly raise, with fair precision and in due time, the preemption issue in their brief to the South Carolina Supreme Court or in their Petition for Rehearing. Paraphrasing language set forth in *Adams v. Robertson*, 520 U.S. at 87-88 (1997):

> Petitioners have done nothing to demonstrate that they complied with the applicable state rules for raising their federal [preemption] claim before the [South Carolina] Supreme Court, or to explain why the failure to comply with those rules would not be an adequate and independent ground for the state court to disregard that claim.[4]

In order to reach the merits here, another question which this Court would have to address is whether the determinations of the South Carolina Supreme Court qualifies as a valid ground under 9 U.S.C. §2, allowing courts to invalidate arbitration provisions "upon such grounds as exist at law or in equity for the revocation of any contract." Further, this question regarding the court's right to invalidate arbitration provisions under

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[4] Policy considerations and principles of comity along with practical reasons counsel strongly in favor of requiring a federal challenge be, with fair precision and in a timely manner, presented first to the state court. *Webb v. Webb*, 451 U.S. 493, 499-501 (1981).

9 U.S.C. §2 is also an issue which was never preserved because it was never presented below and never decided below. Because this question was not presented below and because this question also is not set forth in the questions presented for review, it is respectfully submitted that this issue should not be considered. *Izumi Seimitzu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) (A questions which is merely "complimentary" or "related" to the question presented in the petition for certiorari is not "fairly included therein."); *Andrew v. Louisville & N. R. Co.*, 406 U.S. 320 (1972).

For this reason it is respectfully submitted that the petition herein should be denied.

C. It is the longstanding policy of the United States Supreme Court and Congress to allow courts to void arbitration contracts based on state law defenses, which includes agreements in violation of public policy.

Contrary to the Petitioner's argument, the decision of the South Carolina Supreme Court did not hold that "notwithstanding the Federal Arbitration Act" state law could invalidate a provision of an arbitration agreement precluding the availability of class arbitration. Rather, the opinion of the South Carolina Supreme Court narrowly addressed only a single provision of a specific contract which violates Chapter 15 of Title 56 of the South Carolina Code (Dealers Act).

As the opinion makes clear, the provision of the contract at issue violates the clearly enunciated legislatively enacted public policy of South Carolina.

This does not mean, and the court opinion below held, that anti-class action arbitration agreement clauses, across the board, are prohibited, or can be prohibited under state law. The opinion, in fact, is in accord with the accepted proposition under 9 U.S.C. § 2 which states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Courts are allowed to consider contract defenses which are generally applicable to all state law contracts, such as the contract being violative of public policy. *Doctor's Assocs. Inc. v. Casarotto*, 517 U.S. 681, 686–687 (1996). Under South Carolina law it is clearly long- established that individuals may never enter contracts in violation of the expressed public policy of the State, *Dill v. Sovereign Camp*, 25 S.E.2d 285 (S.C. 1943), and that contracts in contravention of "public policy" as is found in statute, as here, and the constitution and judicial decisions of this state are void, *White v. J. M. Brown Amusement Co.*, 601 S.E.2d 342 (S.C. 2004). There is no debate that the "violation of public policy defense" is generally applicable to all contracts in South Carolina. In fact, the decision below

enunciates this principle very clearly and is now the law of the case as to this issue. (Pet 10a).

It is also noteworthy that the action here is truly one of state law and not a true class action with the normal requirements of Rule 23. The case is brought under a specific state statute, limited to Dealers Act cases, with the requirements for bringing the action for the benefit of the whole being that the action is one of common or general interest to many persons, or when the parties are numerous and it is impractical to bring them all before the court. Thus, the anti-class action provision of the arbitration agreement[5] is not implicated in true class actions and those brought on non Dealer Act causes of action. The enforceability is only implicated in case of a contract which violates the legislatively declared public policy as set forth in the Dealers Act. Contrary to Petitioner's contention, the state law rule invalidating contracts against public policy is not aimed specifically at dispute resolution agreements but instead covers all contracts which are against public policy of South Carolina as enunciated in its statutes, constitution and judicial decisions.

The South Carolina Supreme Court Opinion determined that the provision of the arbitration agreement violates South Carolina legislatively

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[5] This provision also prohibits "claimant action in court or through arbitration," and if enforced would not allow vindication of any claim at all. This is unlike the *AT&T Mobility* case where the question presented was whether the FAA preempts conditioning enforcement of an arbitration agreement when those procedures are not necessary to insure that the parties are able to vindicate their claims. *AT&T Mobility, LLC v. Concepcion*, No. 09893 *(cert. granted* May 24, 2010).

enacted public policy. The opinion also held that courts in South Carolina will not enforce contract provisions in violation of public policy. (Pet 9a-10a). Both of these determinations are based solely on state law. Both of these determinations are now binding upon all parties both as the law of the case and as precedent. *Ulner v. Ulner*, 369 S.C. 486, 632 S.E.2d 858 (2006); *Robert E. Lee & Co. v. Comm'n of Pub. Works of City of Greenville*, 158 S.E.2d 185 (S.C. 1967). Moreover, these are wholly state law determinations which are not proper for consideration here.

For these reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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